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STATE LEGISLATION UNDER THE WEBB-KENYON ACT

IN the disputed zone between the police power of the state and federal authority over interstate commerce, there have been few questions of greater importance than that in regard to the regulation of intoxicating liquors. A solution of the difficulty was attempted by Congress in 1890, when it passed the Wilson Act,[1] thereby hoping to make more effective, legislation enacted by the states under their exclusive power to regulate manufacture and sale, but inoperative until shipments from without a state had reached the consignees and the original packages had been broken.[2] The force of the federal statute, however, was seriously lessened when the Supreme Court of the United States held that the words "upon arrival" in the Wilson Act referred not to state lines, but to the consignee, and that importations could not be interfered with until they reached the persons for whom intended.[3] A campaign by the prohibition interests for further federal action was immediately begun, but success was not had until the early

[1] Act of Aug. 8, 1890, 26 Stat. at L. 313. It provided that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state, . . . shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

[2] Leisy *v.* Hardin, 135 U. S. 100 (1890).

[3] Rhodes *v.* Iowa, 170 U. S. 412 (1898).

part of 1913, when Congress passed the so-called Webb-Kenyon Act, which prohibits interstate shipments of liquor intended to be used in violation of the law of destination, the theory being that the states may constitutionally interfere with what is not lawful interstate commerce, and there will be no federal impediment to the enforcement of their local regulations.[4]

The constitutional questions involved in the Webb-Kenyon Act itself have been discussed at length.[5] Several of the state courts, moreover, have justified the law (although on varying theories),[6] and while the issues have not been passed upon by the Supreme Court of the United States, little doubt exists, I take it, that the decision there will be favorable. The difficult questions will arise when the attempt is made to determine just what local regulations are valid, and the state courts, in the several cases which have come before them, seem to have had considerable difficulty in resting their decisions on rational principles. In fact, it does not appear that the legislation thus far passed is very well adapted to operate under the federal statute.

When congressional committees were holding hearings on the Webb-Kenyon Bill, its advocates were not very explicit in explaining just how they expected the police power of the states to be made more effective.[7] But it was perhaps the following that they chiefly had in mind: under search and seizure proceedings, intoxicating liquors intended to be used in violation of the law may, in

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[4] Act of March 1, 1913, 37 Stat. at L. 699. It provides that the transportation of intoxicating liquor between the states, "which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited."

[5] See the veto message of President Taft and the opinion of Attorney-General Wickersham, 63d Congress, 1st Sess., Sen. Doc. 103; my paper, "The Constitutionality of the Webb-Kenyon Bill," Cal. L. Rev., September, 1913; A. H. Kerr, "The Webb Act," Yale L. J., June, 1913; W. T. Denison, "States' Rights and the Webb-Kenyon Liquor Law," Col. L. Rev., April, 1914; and the valuable notes, 26 HARV. L. REV. 78 and 533, and 27 HARV. L. REV. 763.

[6] See, *inter alia*, State *v.* Grier and State *v.* U. S. Express Co., *infra*.

[7] See Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 62d Congress, 2d Sess. (particularly the argument of F. S. Caldwell, pp. 130 ff.), and Hearings before the Committee on the Judiciary (Subcommittee III), House of Representatives, 62d Congress, 2d Sess.

several of the states, be declared a nuisance and destroyed.[8] Up to March 1, 1913, these proceedings were impossible as applied to interstate shipments, since any interference with the liquor before it completed its journey and reached the consignee was an interference with valid interstate commerce. Now, however, liquors may be seized, in certain cases, before reaching the consignee, if the state by appropriate enactment so permits, and there can be no valid objection that a federal right is involved: if the liquor is declared a nuisance, it will be because intended for an unlawful purpose and the Webb-Kenyon Act will apply; if not a nuisance, the courts will so judge on the basis of lawful intent, which will make the proceedings an interference with legitimate interstate commerce. There would seem, then, to be little difficulty in this method of enforcement, since, if sufficiently large quantities of liquor are shipped into dry territory, it is manifest that the law is to be violated. But many of the states have no legislation of this character, and, furthermore, declaring the liquor a nuisance is not a penal proceeding. Hence in some jurisdictions difficulty has been experienced in justifying legislation under the Webb-Kenyon Act.

For example, the Delaware Court of General Sessions and the Supreme Court of Delaware differ as to the interpretation of the so-called Hazel Law [9] regulating the shipment, carrying, and delivery of liquors in local-option territory. The portion of the law called into question made it unlawful for any common carrier or liquor dealer to take into dry territory any spirituous liquor, under penalty for conviction, and the same inhibition was extended to any person bringing more than one gallon within twenty-four hours into local-option territory from any point within the state. In the first case under the law the defendant was a Philadelphia liquor dealer who took some liquor across the state line into local-option territory for the personal use of the consignee. The Court of General Sessions held that:

". . . as the defendant was interested in the liquor, for the carrying of which he was indicted, and the same was intended by him when received

[8] This is the case, for example, in South Carolina. See "Laws of the Various States Relating to Intoxicating Liquors," compiled for the use of the House Committee on the Judiciary, 1913, p. 383.

[9] Act of April 8, 1913 (27 Del. Laws, c. 139).

to be carried from the state of Pennsylvania into local-option territory in the state of Delaware, that the Webb-Kenyon Act does apply, the said liquor being received, possessed, or used by the defendant in violation of the law of this state. Even though the liquor was received in another state, its possession, as well as the intention with which it was originally received, continued until delivery was made in Delaware." [10]

If it had been established that the sale took place in Delaware, was prohibited by law, and was not valid as being a part of legitimate interstate commerce, the decision would have rested on different grounds; but the court went so far as to say that:

". . . the carrying of liquor by a liquor dealer from one state into local-option territory of another state, for a purpose not in itself unlawful, is within the prohibition of the Webb-Kenyon Law, when the carrying or delivery of liquor into such territory is prohibited by the laws of the destination state."

But in *Van Winkle* v. *State* [11] the Delaware Supreme Court took the opposite view and declared the Hazel Law inoperative so far as it applied to interstate shipments for valid purposes.

The latter, it seems to me, is the correct ruling. The Hazel Law prohibits all importations into local-option territory, regardless of intent to violate state enactments, and is thus broader than the Webb-Kenyon Act. It would be competent, however, for the state to pass legislation similar to the federal statute and penalize the importation of intoxicants with unlawful intent. If the Webb-Kenyon Law is constitutional, then penal legislation to the same effect is within the power of the state. And if, in the Delaware cases, the consignments had been destined to be sold by the consignees in violation of valid local laws, the Webb-Kenyon Act would have applied; but the Hazel Law, directed at all interstate shipments, certainly valid before Congress acted on March 1, 1913, is void so far as it interferes with the freedom of commerce between the states and cannot be sustained as an exercise of a state's increased powers of police, unless there is illegal intent under a law which the local legislature has the power to enact. This is the view which was adopted in considerable measure by the Ken-

[10] State *v.* Grier, 88 Atl. 579 (Delaware, Court of General Sessions, 1913).

[11] 91 Atl. 385 (Delaware, Supreme Court, 1914).

tucky Court of Appeals when it considered a statute of very similar tenor.[12]

In *Louisville & Nashville R. R. Co.* v. *Cook*,[13] the Supreme Court of the United States held inoperative, when attempted to be applied to interstate shipments, a statute of Kentucky prohibiting the introduction into local-option territory of intoxicating liquors, with a few exceptions.[14] This, however, the Kentucky Court of Appeals said, did not prevent the statute from "becoming operative to a transaction withdrawn from the protection of the commerce clause by the Webb-Kenyon Act," and the carrier would therefore be "liable when it delivers liquor in a local-option territory to one who intends to use it in violation of the law of the state." The facts showed that the liquor was intended for personal consumption, a lawful use under the state law, and so the statute which was validated under the Webb-Kenyon Act did not apply.

The mistake of the Delaware Court of General Sessions seems also to have been made by the Supreme Court of Mississippi.[15] The legislature of that state passed a law, certain portions of which followed the Webb-Kenyon Act very closely, and made it illegal to ship into the state any intoxicating liquor to be sold or possessed "either in the original package, or otherwise in violation of any law of this state now in force or hereafter to be enacted." The importation in small quantities for personal use was permitted, but, as the state court held, the net result of the statute was to make it "unlawful for any person to order and have shipped to him, or for him to receive, from without the state, intoxicating liquors in quantities in excess of one gallon." In this case the shipment was in excess of one gallon, and the court considered it "clearly within the terms of the Webb-Kenyon Act, as a mere inspection thereof will demonstrate, for it [the act] expressly divests intoxicating liquor of its interstate character when it is intended, by any person interested therein, to be received in violation of the laws of the state into which it is being transported."

Counsel contended that the liquors shipped were not "intended

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[12] Adams Express Co. *v.* Commonwealth, 157 S. W. 908 (Kentucky, 1913).

[13] 223 U. S. 70 (1912).

[14] A number of state statutes make immaterial exceptions in regard to druggists, etc., but these I do not need to consider.

[15] Adams Express Co. *v.* Beer, 65 So. 575 (Mississippi, 1914).

to be sold or used in violation of any law of the state," and therefore that the Webb-Kenyon Act did not apply. (In this case also the liquors were for personal consumption.) But this contention, if valid, the court said, would have the effect of taking the word "received" from the Webb-Kenyon Law, or "interpolating between the words 'received' and 'possessed' the words 'for the purpose of being,'" and this would make the act read: "Which liquor is intended by any person interested therein to be [received] *for the purpose of being* possessed, sold or in any manner used . . . in violation of any laws of any such state." This amendment the court declined to make.

The question is thus raised as to the meaning of the word "received." Acceptance by the consignee of a shipment from without the state is undoubtedly a part of interstate commerce, but may it be made a crime when possession is lawful? In other words, does the Webb-Kenyon Act so enlarge the powers of the states that they can exclude intoxicating liquors from their borders by making it a crime for the consignee to receive interstate shipments? If the state has such a power, two facts are evident: (1) there has been a delegation of legislative power over interstate commerce, since before the passage of the federal law the states could not interfere with the "receiving" of shipments from without their borders, although they could regulate the possession and sale; and (2) the intent, which is the *sine qua non* for the Webb-Kenyon Act to operate, becomes unlawful under a state statute which would be invalid as oppressing interstate commerce, had not the Webb-Kenyon Law been passed.

In the first case the law, so far as the word "received" is concerned, would be an unconstitutional delegation of legislative power, and the second interpretation would be absurd, — a perfect example of reasoning in a circle, — since an intent to violate unconstitutional regulations would make the Webb-Kenyon Act apply in order to validate these very regulations. An intent to violate laws which the states have not the power to pass is not sufficient to make the Webb-Kenyon Act operate; in other words, the Mississippi court's interpretation would have the federal law make possible state enactments before the conditions for its own application were complied with. It follows, therefore, that state laws like the one in Mississippi must remain unconstitutional

so far as interstate commerce is concerned. Apart from this, the purpose of Congress was simply to enable the states to enforce their already valid local laws, although in order to do this they would make procedural regulations, previously invalid, but possible when applied to what is not properly interstate commerce.

It must be concluded, therefore, that the word "received" is surplusage, except perhaps in one case: where the state forbids possession. Then, if a shipment were received from without the state, its acceptance would be such a part of, and so mingled with, the criminal possession that it would be competent for the local authorities to punish the consignee for receiving the liquors: the acceptance and possession would be practically the same act. But even this (which is a novel situation and has not come before the courts) would be possible irrespective of the Webb-Kenyon Law. Our conclusion is, therefore, that the Mississippi court was in error when it held that the state had the power to punish a consignee for "receiving" interstate shipments.

Two other sections of the Mississippi act came before the court incidentally. The first compelled the carrier to keep a record of every consignment of intoxicating liquor and to file with the clerk of the circuit court of the consignee's county his name, that of the consignor, the amount and kind of liquor delivered. A second section forbade delivery to other than the *bonâ fide* consignee or, in case of sickness, his agent with written authorization. The carrier was also required to make the consignee sign a statement giving the use for which the liquors were intended, and promising that there would be no violation of the law. The court held this latter section "clearly within the provisions of the Webb-Kenyon Act," since the conditions were "only such as must be complied with by the consignee before it becomes lawful for him to receive the liquor." But, as the foregoing argument of this paper has attempted to make clear, the Webb-Kenyon Act sanctions nothing of the kind; such legislation must be justified under the general police power of the state.

This was the attitude taken by the Supreme Court of Tennessee in *Palmer* v. *Southern Express Company*.[16] The court held that an act of the legislature (subsequent to the Webb-Kenyon Law)

[16] 165 S. W. 236 (Tennessee, 1914).

"forbidding any interstate carrier of intoxicating liquor to deliver liquor to the consignee, unless the latter delivers a statement giving his name and address and stating the use for which the liquor was ordered, directly interferes with interstate commerce as imposing a condition precedent on the exercise by the carrier of the right to make delivery of an interstate shipment, and on the right of the consignee to receive delivery, and cannot be sustained as an exercise of the police power, or as authorized by the Wilson Act, which subjects liquor to state regulation, but which does not apply before actual delivery to the consignee." Under the facts of this case the shipment was intended for a lawful use, the possession of the liquors was not forbidden, and the Webb-Kenyon Act did not apply.

A question of somewhat different character was raised in Idaho.[17] There the law, passed in 1909, made it a crime for any person or corporation within the state to accept for shipment to anyone in prohibition territory, "except as may be authorized by this act or the interstate commerce law of the United States." A carrier promulgated the rule that shipments from without the state should be governed by the same rules as intrastate shipments, and the Federal District Court refused to issue a mandamus compelling the carrier to accept liquors for shipment from points without the state to points within the prohibition districts. But it would seem that here also the court erred, the analogy to the Kentucky law being tolerably close: the regulations were valid as to intrastate commerce, but invalid as to interstate commerce; and in order to make the Webb-Kenyon Act apply there must be the intent to violate a local law. This was not present; hence, it is submitted, the mandamus should have been issued.

Three other state courts, however, seem to have reasoned correctly with regard to local legislation under the federal statute. In Alabama the so-called Fuller Law makes illegal all shipments of intoxicating liquors within the state, except to druggists, etc., and declares that its provisions shall be construed so as not to conflict with "that clause of the Constitution of the United States which confers upon the Congress of the United States the power to regulate commerce." A proper construction of these provisions,

[17] United States *ex rel.* Zimmerman *v.* Oregon-Washington R. & N. Co., 210 Fed. 378 (1913).

together with those relating to manufacture and sale, said the Alabama Supreme Court, "must lead to the conclusion that it was the purpose of the legislature in that bill to declare that it should be unlawful for any person to have in his possession, or to deliver to any other person at any point in the state, liquors not within interstate protection and which were intended for unlawful use."[18] By the Webb-Kenyon Act, however, this interstate protection is removed, and so the court concluded:

"When, therefore, a common carrier in this state is possessed of liquor for delivery to a person who intends to put it to an illegal purpose, such common carrier itself violates the law of the state and becomes amenable to the state laws for such violation, unless, indeed, it is without knowledge as to the unlawful purposes of the consignee."

This, it is submitted, was a correct ruling.

Even simpler facts were involved in a Kansas case. A carload of beer was shipped from St. Louis, Missouri, to Corona, Kansas. On the arrival of the car it was placed on a siding where the liquor, before delivery to the consignee and before the original package was broken, was seized by the sheriff. The brewing company answered to notices of seizure and claimed the beer, but it was shown that the beer was destined for an unlawful purpose; under the Webb-Kenyon Act it was not legitimate interstate commerce, and the authority of the state could attach before the acceptance by the consignee or the breaking of the original package.[19]

In an Iowa case, also, there was clear intent to violate valid local regulations prohibiting the manufacture, sale, or keeping for sale of intoxicating liquors. Common carriers are forbidden to transport to consignees not holding permits to sell under the state law, and this applies to shipments with intent to violate the law against sale, etc. Under the Webb-Kenyon Law, therefore, the court issued an injunction to restrain an express company from bringing in and distributing such liquors. The law under which this relief was secured was inoperative as applied to interstate commerce before the act of Congress, but the court held that no reënactment was necessary.[20]

This, however, was not the view of the Supreme Court of South

[18] Southern Express Co. *v.* State, 66 So. 115 (Alabama, 1914).

[19] State *v.* Doe *et al.*, 139 Pac. 1169 (Kansas, 1914).

[20] State *v.* U. S. Express Co., 145 N. W. 451 (Iowa, 1914).

Carolina.[21] Parts of the South Carolina "dispensary law were unconstitutional in so far as they attempted to prohibit the importation of liquor from another state for personal use, at the time of their adoption." The court held that "the removal of the constitutional objections to such statutes by the enactment of the Webb-Kenyon Act did not give them force and effect by operation of law, nor can they be validated by subsequent statute, since an unconstitutional statute is utterly void," but since the passage of the Webb-Kenyon Act "the legislature has the power to adopt a statute with provisions similar to those in the dispensary law, held unconstitutional prior to that enactment." It is settled, however, that no reënactment of inoperative state laws will be required.

The constitutionality of the Wilson Act [22] was considered by the Supreme Court of the United States on these facts: the petitioner (for a writ of *habeas corpus*) was arrested on the ninth of August, 1890, charged with selling imported liquor contrary to the laws of Kansas. The Wilson Act had gone into effect the day before, and the Supreme Court held that "the petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the state, upon the implication arising from the want of action on the part of Congress up to that time." Prior to the passage of the Wilson Act, the police regulations of Kansas in respect to intoxicating liquors did not control imported articles until after the original package had been broken. The court said:

"[The state legislation attacked in *Leisy* v. *Hardin*,[23]] as construed to apply to importations into the state from without, and to permit the seizure of the articles before they had by sale or other transmutation become a part of the common mass of property of the state, was repugnant [to the commerce clause] in that it could not be given operation without bringing it into collision with the implied exercise of a power exclusively confided to the General Government. This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state."

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[21] Atkinson *v.* Southern Express Co., 78 S. E. 516 (South Carolina, 1913).

[22] *In re* Rahrer, 140 U. S. 545 (1891).

[23] *Supra.*

And the present case is not one "of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which would not operate upon articles occupying a certain situation until the passage of the act of Congress. The act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a reënactment of the state law was required before it could have the effect upon imported, which it had always had upon domestic, property."[24]

If the Supreme Court of the United States upholds the Webb-Kenyon Law, it will undoubtedly follow this ruling under the Wilson Act, and so the South Carolina court was in error. The proper construction was adopted by the Iowa and Kentucky courts, the latter holding that the state statute, which was inoperative as applied to interstate commerce, became operative when the commerce was with intent to violate the law. States, therefore, will not be compelled to reënact their regulations.

From the survey which has been made of the cases already decided, it is evident that, in order for the Webb-Kenyon Act to apply, there must be intent to violate a previously valid state law. Disregard of this has led to erroneous conclusions, particularly in the opinion of the Mississippi court.[25] If the enactments making the intent unlawful are constitutional, irrespective of the Webb-Kenyon Act, the state is empowered under the federal statute to take proceedings hitherto impossible.

It would seem, however, that in order to make their prohibition regulations completely effective, the states will be compelled to forbid the possession of more than small quantities of intoxicating liquors for personal use, with perhaps a few exceptions, — licensed druggists, for example. Such legislation would not be designed to interfere with personal consumption or the liberty of the individual, but would simply make more difficult the evasion of laws whose validity is beyond question. While the state courts have differed as to the constitutionality of such action,[26] there is little doubt, I think, that under the decisions of the Supreme Court of the United

[24] *In re* Rahrer, *supra*, pp. 563, 565.

[25] Adams Express Co. *v.* Beer, *supra*.

[26] Black on Intoxicating Liquors, § 38; Edge *v.* Bessemer, 164 Ala. 599, 51 So. 246, 26 L. R. A. N. S. 394 and n. (1909); 24 L. R. A. N. S. 172 and n.

States, the states have the power to make criminal the possession of more than a specified quantity of intoxicants.[27]

In addition to this, the states should provide for search and seizure proceedings to condemn shipments in excess of the permitted amount as soon as they cross state lines. The intent to violate local regulations would be clear; under the Webb-Kenyon Act the shipments would not be valid interstate commerce, and the states could thus exclude all consignments of liquor except in small quantities for personal use.

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[27] See the language of Mr. Justice Harlan, Mugler *v.* Kansas, 123 U. S. 623, 662 (1887); Freund, Police Power, §§ 453–455.